*discharge of his duty*, the witness must have had a *duty* resting upon him which could only have been imposed by the service of a subpœna. In the case of *The State* v. *Keyes*, 8 Vt. 57, Chief Justice REDFIELD, decided that if a person knew he was to be a witness in a public prosecution he was not only a witness, but was in duty bound not to secrete himself, so as to prevent the service of process, and the authorities seem to be conclusive to the effect that process need not actually have been served: *State* v. *Carpenter*, 20 Vt. 9: *State* v. *Early*, 3 Harrington 562; 2 Wharton on Crim. Law (7th ed.), § 2287; 4 Black. Com. 126; 1 Bish. Criminal Law, § 665; 1 Russell on Crimes 183; 2 Bish. Crim. Pro., § 897; *Commonwealth* v. *Reynolds*, 14 Gray 87; *State* v. *Biebusch*, 32 Mo. 276.

H. B. JOHNSON.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]

COURT OF APPEALS OF MARYLAND.[2]

SUPREME COURT OF PENNSYLVANIA.[3]

SUPREME COURT OF VERMONT.[4]

### ARBITRATION AND AWARD.

*Umpire.*—By a parol agreement to submit a matter in controversy to the arbitration of two persons, it was stipulated that, in case they could not agree, they should select an umpire, and that the decision of such umpire and any of said arbitrators should be final, &c. *Held*, that the decision of the umpire was all that was required. If one or both the arbitrators had agreed with him, it would still have been the decision of the umpire: *Sanford et al.* v. *Wood*, 49 Ind.

### BANKRUPTCY.

*Plea of.*—Plea in bar that since the commencement of suit, the defendants had been adjudged bankrupts, and the plaintiff had proved its debt in bankruptcy, and that the bankruptcy proceedings were still pending. *Held*, bad on general demurrer: *Brandon Manufacturing Co.* v. *Frazer*, 47 Vt.

### BILLS AND NOTES.

*Partnership—Want of Authority—Defence against Bond fide Holders.*—Adams, a partner of Moorehead & Co., drew a note in favor of Whitten & Co., of whom also he was a member, and, after it was endorsed by the payees, endorsed the name of Moorehead & Co.; the note was sold to the plaintiff by a known bill-broker. *Held*, that these circumstances were not notice to the plaintiff that the endorsement was without authority: *Moorehead* v. *Gilmore*, 77 Pa.

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[1] From Jas. B. Black, Esq., Reporter; to appear in 49 Indiana Reports.

[2] From J. Shaaf Stockett, Esq., Reporter; to appear in 41 Maryland Reports.

[3] From P. Frazer Smith, Esq., Reporter, to appear in 77 Pa. State Reports

[4] From Hon. J. W. Rowell, Reporter; to appear in 47 Vermont Reports.

If the note had been offered by Whitten & Co., that would have been notice that Moorehead & Co. were merely accommodation endorsers, and sufficient to put the plaintiffs upon inquiry: *Id.*

The broker was the agent of Whitten & Co. to sell, and not of the plaintiff to buy; plaintiff was not bound to inquire by whom he was employed, nor would the broker, if asked, be bound to inform him: *Id.*

Each partner has the same right to raise money for the use of the firm by endorsemeut of negotiable paper as to do so by means of paper already issued, and the public is not affected by the private restriction on the power of each partner: *Id.*

On the face of the note, it had come to Moorehead & Co., by endorsement of Whitten & Co.; that it was originally given by Adams for his individual debt was immaterial. The presumption was that the endorsement of Moorehead & Co. was in the usual course of business: *Id.*

Nothing but clear evidence of knowledge or notice, fraud or *malâ fides* can impeach the *primâ facie* title of the holder of negotiable paper taken before maturity: *Id.*

*Note taken in Payment of a Pre-existing Debt.*—One who takes a negotiable note before maturity, at its full value, in payment of a pre-existing debt, in good faith, and without notice of anything that would invalidate it in the hands of the payee, is a *bonâ fide* holder for value, and not affected by any equities existing between the original parties: *Russell* v. *Splater*, 47 Vt.

*Warrant of Attorney to confess Judgment destroys Negotiability.*—A note payable to order with interest, with an addition "in case of non-payment at maturity, five per cent. collection fees to be added;" with warrant of attorney to enter judgment for amount of the note and the five per cent., with costs of suit, release of errors, without stay of execution, waiving exemption, inquisition and condemnation, and to sell on *fi. fa: Held*, not negotiable, by reason of the warrant of attorney contained in it: *Sweeney* v. *Thickstun*, 77 Pa.

### Broker. See *Usage.*

*For Sale of Real Estate—Right to Commission.*—Where the owner of real estate agreed with a real estate broker that he would pay him a certain amount if he would find a purchaser within a reasonable time, who would pay a certain price for his real estate, if within such time the broker procured such purchaser, he was entitled to recover his commission, though the owner of the real estate sold the same before the broker found the purchaser: *Lane* v. *Albright*, 49 Ind.

### Common Carrier.

*Owners of Tow-boats are not.*—The owners of a tow-boat are not common carriers; in an action by them for towing barges where, under a plea of set-off and payment, the defendant alleged that the tow was lost by the negligence of the owners of the boat, the burden was on him to show such negligence: *Hays* v. *Millar*, 77 Pa.

The defendant having given evidence tending to show that the loss was from the negligence of the plaintiff's pilot and engineer, evidence that those officers were competent, skilful and careful, was inadmissible: *Id.*

A master is responsible for the negligence of his servants in the

course of their employment, without regard to their character for care or skill; except in the case of fellow-servants, or of a servant employed by him in some independent work. When an act or omission of defendant is proved, whether it be actionable negligence, is to be determined by the character of the act or omission, not by the defendant's character for care and caution: *Id.*

*Bill of Lading—Construction of.*—Where a railroad company received freight to be transported partly by rail and partly by water, and it was stipulated in the bill of lading, that "it is especially agreed and understood that the company is not responsible * * * for loss or damage on the lakes or rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company;" and the freight, after being carried by the defendant, was placed upon a wharf-boat, awaiting the arrival of a packet wherein to ship it, and the wharf-boat sunk without the fault of the railroad company, and the freight was lost. *Held*, that the loss was not one occurring on the lakes and rivers within the meaning of the bill of lading. *Held*, also, that the bill of lading should be construed to mean, that the carrier was not to be responsible, in the absence of negligence, for loss or damage occurring in the navigation of the lakes or rivers: *The St. L. & S. E. Railway Co.* v. *Smuck et al.*, 49 Ind.

## Conflict of Laws.

*Foreign Judgment for Alimony—Service by Publication.*—A judgment for alimony rendered in another state, where the only notice to the defendant was by publication, and he did not appear, and the record does not show that he was a resident of that state, can have no force in this state: *Middleworth et ux.* v. *McDowell*, 49 Ind.

## Contract. See *Usage.*

*Whether Entire or Separate—Rescission—Custom.*—Defendant bought 4000 barrels of oil from plaintiff, and eight similar papers of same date were executed by them, each for the delivery of 500 barrels on the last day of consecutive months, payment to be made on each delivery. *Held*, not to be an entire contract: *Morgan* v. *McKee*, 77 Pa.

The plaintiff, on demand, refused to deliver the oil due on one of the appointed days; the defendant on the next day for delivery, gave notice of rescission, on the ground of the previous default. *Held*, the plaintiff might recover for refusal of defendant to accept and pay for the oil which was tendered on the days appointed for the subsequent deliveries: *Id.*

The right to rescind a contract must be exercised within a reasonable time after the breach. What is a reasonable time, is for the court: *Id.*

Evidence was inadmissible, that at the time of the purchase it was agreed that it was an entire contract, and that the several papers were executed with that understanding and according to the custom of the trade: *Id.*

*Novation.*—C. purchased the defendant's millinery goods, and in part consideration thereof, agreed to pay the defendant's debt to the plaintiff. C. thereupon wrote the plaintiff that her husband *proposed* to give his note on six months for said debt, and the plaintiff replied, *accepting the*

*proposition* The note was never given, but C. made remittances to the plaintiff from time to time, to apply on said debt. *Held*, a mere accord, and that the defendant was not thereby discharged from the balance of the debt: *Rising* v. *Cummings*, 47 Vt.

Waiver of a promise to pay the debt of another that is without consideration and within the Statute of Frauds, or refusal to receive such payment, does not discharge the original debtor: *Id.*

COVENANT. See *Lease.*

CRIMINAL LAW.

*Evidence—Character of Person assaulted.*—To make it competent for a party complained of for assault and battery, to show that the person assaulted was quarrelsome and fractious, he must show that he had knowledge of such fact; for the theory upon which such evidence is admitted is, the influence which such knowledge may be supposed to exert upon the conduct of the party in preventing or repelling an assault: *State* v. *Meader*, 47 Vt.

CUSTOM. See *Contract; Evidence; Usage.*

DEBTOR AND CREDITOR. See *Bills and Notes; Contract.*

*Application of Payments.*—Payments made to a creditor holding demands both due and undue, without direction by the debtor as to their application, must, ordinarily, be first applied by the creditor upon the demands due: *Early* v. *Flannery*, 47 Vt.

DOWER. See *Husband and Wife.*

DURESS.

*Duress of Imprisonment—Rescission of Contract.*—If one, claiming that he has purchased property, but knowing that he has not, maliciously, and without probable cause, sues out a writ in trover for it, for the purpose of frightening and coercing the owner to sell it to him; and the owner, being a man of ordinary firmness, is thereby induced, through fear of arrest and imprisonment, to make such sale, the sale is void for duress of imprisonment. *Held*, that it was not necessary, to make the defence of duress of imprisonment available, that the pretended vendor should have offered to rescind the contract, and return a note given for the purchase-money: *Brownell* v. *Talcott*, 47 Vt.

*Avoidance of Promise for.*—A promise extorted by terror or violence, whether on the part of the person to whom the promise or obligation is made or that of his agent, may be avoided on the ground of duress: *Bush* v. *Brown*, 49 Ind.

If a party execute an instrument from a well-grounded fear of illegal imprisonment, he may avoid it on the ground of duress: *Id.*

To a suit upon a promissory note, it is a good answer to allege that the plaintiff induced the defendant to go with him to a secluded place, and there accused the defendant of having performed an abortion upon the plaintiff's wife, and that a certain person who was then present was an officer, having power to arrest and imprison the defendant, and that the plaintiff there threatened the defendant with immediate arrest and imprisonment, unless the note in suit was made, and fearing such arrest

the defendant made the note, and that he had never committed the crime charged: *Id.*

EQUITY.

*Apportionment of Expense of Repairs among Joint Owners of Water-power—Costs.*—It is the proper exercise of equity jurisdiction, to apportion among parties having a common interest in the use of a waterpower, and on whom rests a common duty of maintaining the dam which creates the power, the burden and expense of such duty: *Sanborn* v. *Braley*, 47 Vt.

One-third of the orator's costs of taking testimony disallowed, because of unnecessary prolixity: *Id.*

EVIDENCE. See *Criminal Law; Husband and Wife; Usage.*

*When Parol Evidence is admissible in cases of Written Contracts.*—While parol evidence is inadmissible to alter, vary or contradict a written contract, it is admissible to prove an independent collateral fact about which the written contract is silent: *Fusting* v. *Sullivan*, 41 Md.

Where by a written contract F. sells his store, the stock of goods therein, his house, lumber-yard and lumber therein, barn and barn-yard to S. upon terms specified, parol evidence is admissible to show that it was verbally agreed between the parties during the negotiation, and before the contract was concluded, that S. bought with the distinct understanding that F would not go into business in Catonsville, the place where the store was located, and that the acquisition of the good-will of the store and the agreement of F. not to set up another store in Catonsville, was part of the consideration of the purchase: *Id.*

*Name—Idem Sonans.*—A deed described the land thereby conveyed as being in "Lington," in the county of Addison. *Held*, that the name "Lington," was so like the name *Lincoln*, a town in said county, and so unlike the name of any other town in the county, that the deed was properly admitted in evidence, in connection with other evidence showing the situation and circumstances at the time, as tending to show that the *locus in quo* was the land conveyed by the deed: *Armstrong* v. *Colby*, 47 Vt.

*Declarations against Interest.*—In trover, the defendants claimed title to the property through B., who turned it over to them to secure a then existing debt. *Held*, that the declarations of B. against his title to the property, made while it was in his possession, and before he assigned it to the defendants, were admissible against the defendants, and that they might be proved by persons other than B.: *Alger* v. *Andrews*, 47 Vt.

*Telegraph Dispatch—Secondary Evidence.*—In an action against a telegraph company for damages for failure to transmit a dispatch, the original dispatch delivered to the operator must be given in evidence, or if not, its absence must be properly accounted for before secondary evidence thereof can be admitted: *The Western Union Tel. Co.* v. *Hopkins*, 49 Ind.

FOREIGN JUDGMENT. See *Conflict of Laws.*

FRAUDS, STATUTE OF. See *Contract.*

*Promise to pay another's Debt.*—Long sold his interest in a firm to

his partner for $700, the partner to pay all the debts of the firm; the $700 being unpaid, the partner sold to Townsend, who, by parol, agreed to pay the amount due Long as the consideration. *Held*, that the promise was not within the Act of April 26th 1855, sect. 1 (Frauds), and Townsend was liable to Long on his promise: *Townsend* v. *Long*, 77 Pa.

The general rule is that a parol promise to pay the debt of another is within the statute, where it is collateral to a continued liability of the original debtor: *Id.*

If a parol promise be to pay absolutely or conditionally the debt of another, due or to become due on an existing contract, it is generally within the Statute of Frauds: *Id.*

The consideration for the promise is important only where it is a transfer of the creditor's claim to the promissor, making the transaction a purchase, or where it is a transfer of a fund pledged, set apart or held for the payment of the debt: *Id.*

## Gift.

*Imperfect.*—An account was opened in a savings' bank to the credit of "James Cannon, subject to his order, or to the order of Mary E. Cannon," his daughter; and money from time to time was thus deposited. Upon the death of James Cannon, Mary E. Cannon claimed that her father, in his lifetime, had given her the book of deposit with the money credited therein, to be held by her in trust for herself, and her brothers and sisters. The only mode in which money could be changed from one person's account to another's in the bank was "by a payment of the one account and a new deposit in another account." Upon a bill filed by the administratrix of James Cannon claiming the money in bank as belonging to his estate, it was *Held*, that the deceased had not parted with the legal dominion and control over the money standing in his name in the bank, because it was there subject to his order, or *the order of his daughter;* nor did the delivery of the book of deposit constitute a delivery of the money, and the complainant was therefore entitled to it as of the estate of her intestate: *Murry* v. *Cannon*, 41 Md.

## Husband and Wife.

*Declarations at time of executing Deed—Conveyance in Fraud of Dower.*—In a proceeding to have a deed declared fraudulent and void as against the rights of the widow of the grantor, his declarations to the conveyancer with respect to the deed, and his object and purpose in making it, being contemporaneous with its preparation and execution, are admissible in evidence: *Sanborn* v. *Lang*, 41 Md.

A married man by a deed voluntary and without valuable consideration, conveyed nearly the whole of his property to his nephew. To the conveyancer who prepared the deed, he stated that his purpose was to deprive his wife of the property. The deed was executed on the 20th of May 1872, and recorded the same day in Baltimore. The grantee lived in New Hampshire and never had possession of the deed till after the death of the grantor in July 1873. Before the deed was executed, a power of attorney was sent to the grantee and executed by him in New Hampshire, by which the grantor was authorized "to sell and convey, mortgage or otherwise dispose of the property." In August 1872,

the grantor wishing to borrow $1000 for his own use, one of the pieces of property mentioned in the deed, was mortgaged to secure it. The mortgage and notes were sent to the grantee and by him were executed. The grantor remained in possession of the property embraced in the deed, until his death. On a bill filed by the widow against the grantee, to have the deed declared void as in fraud of her rights, it was *Held:* that the deed was not made *bonâ fide;* but as to the complainant was fraudulent, and could not operate to deprive her of her legal rights as widow and distributee: *Id.*

## INSURANCE.

*Interest of Insured.*—A policy of insurance provided that if the interest or property insured be leasehold, or that of mortgage, or any other interest not in fee simple in case of real estate, or absolute as to personal property, such must be made known to the company, and expressed in the policy. *Held*, that said provision was only obligatory upon the insured when the *united* interest of the insured in the property was less than absolute: *Rankin* v. *Andes Ins Co.*, 47 Vt.

*Re-insurance—Policy—Estoppel.*—Where property is insured, and the insurer re-insures, and it is destroyed by fire, and before the loss is paid, the original insurer becomes bankrupt, and the assured receives but a small dividend out of the bankrupt's estate, the re-insurer is still liable to pay the whole amount of the re-insurance to the trustee of the original insurer, without deducting the dividend, and the original assured has no claim in respect of the money so paid· *Consolidated Real Estate & Fire Ins. Co.* v. *Cashow*, 41 Md.

Where a policy of insurance containing an acknowledgment of the receipt of the premium, has been issued and delivered to the assured, the insurance company will not be permitted to allege a want of consideration for its promise when sued thereon, after a loss has happened: *Id.*

By a policy of re-insurance, the insurance company stipulated that their insurance of $5000, was part of the "sum or sums insured by the Fulton Fire Ins. Co. of New York as above, for Newhall, Borie & Co. by their policies Nos. 2335 and 2779, *and to be subject to the same risks, valuations, conditions and mode of settlements as are or may be adopted or assumed by said company.*" In an action on the policy, it was *Held*: that this clause not only dispensed with preliminary proof of loss, but fastened the responsibility of the defendant to the settlement and adjustment made by the original insurer with the original assured, as to the *amount of loss: Id.*

## LEASE.

*Covenant for quiet Enjoyment—Elder and better Title.*—A covenant for quiet enjoyment relates to the lessor's title and right to grant the premises, and to the possession thereof during the term, and not to their possession and enjoyment in fact by the lessee, as against those having no right to disturb him. It is a covenant that the lessee shall not be *rightfully* disturbed in his possession and enjoyment during the term, not that he shall not be disturbed *at all: Underwood* v. *Birchard*, 47 Vt.

The defendants, as trustees, leased trust property to the plaintiff,

which was in the possession of third parties, under an agreement with the defendants' predecessors in the trust. Said parties continued in possession of the property during the plaintiff's term, and would not surrender to him. It did not appear that said parties were entitled under said agreement, to hold as against the plaintiff, nor that they had any other title by which they could rightfully keep him out. *Held*, that the plaintiff was not kept out by title elder and better than his own: *Id.*

LIEN. See *Trust.*

LIMITATIONS, STATUTE OF.

*Promise to pay Debt barred by—Payment of Interest on.*—Where the remedy on a single bill has become barred by the statutory lapse of time, the mere payment of interest on the debt will raise no such promise as will support assumpsit for the amount due on the single bill. Nothing less than an *express promise* to pay the amount due thereon, made after the statute has become a bar to the remedy on the bond itself, will suffice to maintain an action of assumpsit to recover the amount due: *Leonard* v. *Hughlett*, 41 Md.

In an action of assumpsit on an express promise to pay the amount due on a single bill barred by limitations, the single bill may be given in evidence as the inducement to, or as explanatory of, and as furnishing the legal basis of the express promise: *Id*

MASTER AND SERVANT. See *Common Carrier.*

MERGER.

*Of Simple Contract in Specialty.*—There cannot be a contract under seal and a simple contract between the same parties for the payment of the same debt. There will be a merger of the simple contract, whether the parties wish it or not, for the two contracts are incompatible, and, except where one is intended to be simply collateral to the other, they cannot exist together, and the higher must prevail: *Leonard* v. *Hughlett*, 41 Md.

NAME See *Evidence.*

NEGLIGENCE See *Common Carrier.*

*Railroad Train—Injury to Conductor—Knowledge—Master and Servant—Damages.*—By the custom and regulations of a railroad company, trains in convoy were equipped, each with one engineman, one fireman, one conductor and one brakeman. The conductor of a train in convoy, on such road, had his leg crushed by collision with the train immediately following his, and died shortly thereafter. In an action against the railroad company by the widow of the deceased to recover damages for his loss, it was *Held*, That if he had knowledge of this custom and practice at the time of his employment and afterwards, and with such knowledge continued for eight or nine months in his employment, as conductor on trains in convoys thus equipped, and also knew that the train following his on the night of the collision was equipped in the same manner, such knowledge on his part would prevent a recovery on account of any supposed deficiency in equipment in this respect: *Baltimore & Ohio Railroad Co.* v. *State, use of Woodward*, 41 Md.

In an action against a railroad company, by a widow to recover dam-

ages for the killing of her husband by a collision of trains of the defendant, he being at the time in the employ of the defendant, the jury, in assessing the damages, if they find for the plaintiff, must estimate the reasonable probabilities of the life of the deceased, when injured, and give the plaintiff such pecuniary damages as will compensate her for losses already suffered as the direct consequence of her husband's death, and also for the prospective losses she will suffer as the direct consequence of such death during the period, the jury, under all circumstances, shall deem to be the probable duration of her life: *Id.*

## PARTITION.

*Mortgagee of undivided Interest not a proper party to.*—A mortgagee of an interest in an undivided estate is not entitled to be made a party to a proceeding in partition; cannot do any act affecting the title or estate of his mortgagor; nor can he object to partition by the parties themselves; if competent, they are not bound to go to law to make the partition: *Long's Appeal*, 77 Pa.

When partition is made, the security of the mortgage follows the separation and attaches to the estate held in severalty: *Id.*

The mortgagee may object to fraud or unfairness affecting his interest; but if the partition be fairly made he cannot gainsay it: *Id.*

## PARTNERSHIP. See *Bills and Notes.*

## RAILROAD. See *Negligence.*

## SHIPPING.

*Repairs to a Vessel—Authority of Captain to pledge Owner's Credit —Authority of Owner to pledge Credit of his Co-owner.*—The captain of a vessel, as such, has no authority to pledge the credit of the owner for necessary repairs made at the home port, where the owner resides, and can be consulted, and can personally interfere: *Pentz* v. *Clarke*, 41 Md.

And the fact that the captain is also a part owner of the vessel, gives him no authority to pledge the credit of his co-owner for such repairs. In order to bind the owner of a vessel for necessary repairs done at the home port where he resides and can personally interfere, the master must have special authority for that purpose; or the owner must have held out the master as having such authority; or he must have ratified the contract after it was made: *Id.*

## SURETY.

*Voluntary Payment by Surety.*—When a surety pays a debt, he must be legally bound for it, to enable him to recover the amount paid of the principal, and the principal must also, at the same time, be under a legal obligation to pay the debt. *Hollinsbee* v. *Ritchey*, 49 Ind.

In an action of replevin, where a bond is filed and possession of the property obtained, and afterward the suit is dismissed by agreement of the parties, the plaintiff agreeing to pay the defendant a certain sum, but where no judgment is rendered, if the surety on the replevin bond afterward, without the request of the plaintiff, pay the amount agreed to be paid to the defendant, he can not recover the same of his principal, the payment being voluntary on the part of the surety: *Id.*

*Fairness to Surety—Duty of Surety.*—As a rule of law, strict integrity and complete fairness are due from the creditors of a debtor to one who is about to become surety for such debtors; but this rule will not excuse the person about to become surety from reasonable attention to the circumstances under which he is called upon and reasonable diligence to inform himself as to the prudence of the act he is about to do: *Stedman et al.* v. *Boone*, 49 Ind.

If a person who is asked to become surety for another is put upon his guard by the circumstances surrounding the party for whom he is asked to become surety, and can ascertain from the persons present all the facts necessary to shield himself from fraud, he should make the inquiry: *Id.*

Fraud must not be induced by the person who complains of it, nor must he suffer himself to become an indolent victim: *Id.*

## Trust.

*Trustee's Lien for Reimbursement of Expenses.*—Trustees have an inherent equitable right to be reimbursed all expenses reasonably incurred in the execution of the trust; and it is immaterial that there are no provisions for such expenses in the instrument of trust: *Rensselaer & Saratoga Railroad Co.* v. *Miller*, 47 Vt.

All such expenses are a lien upon the trust property; and the trustee will not be compelled to part with the property until such expenses are paid: *Id.*

## Usage. See *Contract.*

*Real Estate Broker—Unlawful Commissions—Usage or Custom cannot control a well-established principle of Law.*—When a real estate broker, employed to sell a farm, disposes of it by way of exchange for other real estate, he is not entitled to charge the owner of the latter a commission for effecting the exchange. The law does not permit the broker in such a case to act as agent for both parties. Even an agreement to pay such commission, could not be enforced by an action thereon: *Raisin* v. *Clarke*, 41 Md.

Nor could an action for the recovery of such commission be maintained, although by a custom or usage existing among brokers in the place where the exchange was effected, they were entitled in exchanges of real estate to a commission of two and a half per cent. from each party, on the amount or value of the property exchanged: *Id.*

*Custom of Trade—Cannot control plain Language of Contract.*—McKee, by written agreement, sold the coal on his farm to defendants for 10 cents for each ton "of screened coal mined and removed from his land." The defendants mined and screened and removed both lump and nut coal. *Held*, that evidence was inadmissible to show that "screened coal" is understood amongst coal merchants and miners to include only lump coal; or to prove the relative value and quality of lump and nut coal for the purpose of showing that nut coal is not "screened coal," in its common acceptation; that at the time of the contract there was no market for nut coal, and that it was removed from necessity and did not pay expenses: *Mercer Mining Co.* v. *McKee, Adm'r*, 77 Pa.

Although the meaning of a term used in a contract and applied to an

article in a trade or business, may be proved by persons engaged in it, yet the defendants having screened and removed both kinds of coal, were estopped to allege that either was not "screened coal:" *Id.*

## Vendor and Purchaser.

*Defaulting Purchaser at an Executor's Sale, entitled upon a Re-sale of the property, to the Surplus Proceeds.*—An executor under and by virtue of a power in the will of his testator, sold certain real estate, and the purchaser signed a written memorandum whereby he agreed and bound himself to comply with the terms of sale upon the ratification thereof by the Orphans' Court. The sale was reported to, and finally ratified by, the court. The purchaser having made default in complying with the terms of sale, the court in pursuance of the provisions of the Act of 1870, ch. 82, ordered the property to be re-sold at his risk. The property was accordingly re-sold, and the amount bid at the re-sale exceeded that bid at the first sale. The original purchaser thereupon claimed this excess, or so much thereof as might remain after payment of all proper expenses, cost and charges for which he was liable by reason of his default. This claim was resisted by the executor. *Held.* 1st. That as the property at the re-sale was sold as that of the first purchaser, and at his risk, he was entitled to whatever balance might remain of the proceeds of the re-sale, after deducting the costs and expenses attending the re-sale, including a reasonable fee for services of counsel in filing the petition and procuring the necessary orders thereon for the re-sale; the executor's commissions on the whole amount of the proceeds of the re-sale, and the amount of the original purchase-money with interest thereon from the date of the first sale to the time of the receipt of the purchase-money by the executor from the purchaser at the second sale. 2d. That the right of the original purchaser to this balance, was not in any way affected by the fact that he was without means of payment, and had given no security for the payment of the purchase-money, and would have been unable to pay the loss to the estate of the testator, if the property had sold at the second sale for less than the amount of the original purchase: *Mealey* v. *Page*, 41 Md.

*Sale of land by Quantity or as a Whole—Abatement or Increase of Purchase-money—Equity.*—Where the intent of a contract for sale of land is clearly to make a sale by the acre, as the means of determining the price, and the contract is *in fieri*, the rule is to compel payment of purchase-money, according to the quantity; and a survey to ascertain the quantity is presumed to have been intended without an express provision for it: *Coughenour's Adm'rs* v. *Stauft*, 77 Pa.

In some cases equity will relieve where the difference in quantity is so great that it strikes the mind as evidence of gross mistake or fraud: *Id.*

When a contract, whether executory or executed, is with reference to an official survey, it will be construed to be a sale according to the quantity stated in it, unless there be express provision for remeasurement, or fraud or such palpable mistake as is evidence of it: *Id.*

Where the contract is executed by deed, or by bond or other security taken for unpaid purchase-money, the rule is not to open such contract to allow a deficiency or recover for an excess even if the sale be by the acre: *Id.*

The rule that a sale by the acre calls for a survey to fix the quantity, will yield always to the intent of the parties to abide by the quantity stated in the agreement or referred to in other writings: *Id.*

The sale being of a defined tract, the quantity named being said to be "more or less," these words are of great force in determining the intent of the parties to stand upon the quantity stated.

A contract was to sell a piece of land, naming adjoiners, &c., "containing 91¾ acres, more or less, being the same and all the land whereon (vendor)now resides," for $10,500, payable, &c., "the remaining unpaid balance to be paid * * * at the rate of $114.40 per acre;" the $10,500 was about $4 more than 91¾ acres at $114.40. The land, by a subsequent survey, contained 118 acres. *Held*, that the $10,500 was the sum fixed to be paid as the purchase-money, and the vendor could not recover for the excess above 91¾ acres, although the contract was executory: *Id.*

WATERS AND WATERCOURSES. See *Equity.*

*Construction of Grant—Liability of Tenant in Common of Water-power to Co-tenant.*—Covenant, that "in case there is not at any time a full supply of water for the simultaneous operations of the works connected with the dam, the grist-mill shall draw its requisite quantity of water, exclusive of all other works." *Held*, that the grist-mill right was not merely a right to use the water exclusively in the manner and for the time it was then accustomed to be used, but a right to use the water in *quantity* as then used, and for such length of time during the season of scarcity as the custom and business of the mill might require; and that if the work done in six hours by the wheel substituted for the one in the mill when the covenant was made, was as much as that done by the latter in twenty-four hours, and with the use of less water, there would seem to be no breach of covenant, provided the business done was the same in character as that being done when the covenant was made: *Howe Scale Co.* v. *Terry*, 47 Vt.

At the time the defendants purchased said grist-mill, the flume and wheel that had been used to operate the plaintiff's machine-shop on the opposite side of the stream, had rotted away, and could not be used. The defendants operated said grist-mill as it ever had been operated, and with proper care, and used water which otherwise could be used by no one. The plaintiff had no flume, wheel, or other appliance by which the water could be used, and gave the defendants no notice that in grinding at their mill they were working injury to the plaintiff, or that the plaintiff purposed or desired to rebuild its works and use the water. The declaration alleged that the defendants had used the water so as wrongfully to deprive the plaintiff of the use thereof to *operate the wheel of said machine-shop*. *Held*, that the defendants, by continuing the use of their grist-mill in the ordinary manner, without notice from the plaintiff as aforesaid, were guilty of no actionable wrong to the plaintiff; and *Held* also, that if the defendants should use the whole water of the stream, when the plaintiff had no machinery or provision for its use, such use would be presumed to be with the consent and for the benefit of all: *Id.*